**APPENDIX "A"**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 71-2165

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Summary Calendar*

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SPENCER O. WALKER and RUBEN IVERY,
Defendants-Appellants.

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*Appeal from the United States District Court for the Middle District of Georgia*

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(January 11, 1972)

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Before THORNBERRY, MORGAN and CLARK,
Circuit Judges.

PER CURIAM: The defendants appeal from a jury conviction based on a one count indictment charging a single conspiracy[1] to possess unregistered stills, to conceal

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*Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of N. Y.*, 431 F.2d 409, Part I (5th Cir. 1970).

1. 18 U.S.C.A. § 371 (1966).

a quantity of distilled spirits upon which the tax had not been paid, and to conduct a distillery business without having posted the requisite bond.[2] Urging reversal, the defendants press several points of error. We affirm.

First, the defendants complain of a fatal variance between the language of the indictment and the proof, *i.e.* they were charged with a single general conspiracy, whereas a trio of separate conspiracies were proven. Several other persons were named as co-conspirators but were not indicted. Defendants claim that the evidence showed, if anything, separate conspiracies each of which was engaged in by some but not all of the named members. However, whether a single conspiracy with different unlawful ends or multiple conspiracies were proved is immaterial in the context of this case since a review of the record convinces us that sufficient evidence was adduced to prove each defendant's connection with all three of the allegations of unlawful conduct. *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), requires that a variance affect substantial rights. The purposes of

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2. The allegations of unlawful conduct as set out in the indictment are as follows:

(a) To unlawfully, wilfully, and knowingly have in possession and custody and under control certain stills and distilling apparatuses used and intended to be used for the distillation of distilled spirits set up without having same registered as required by law, in violation of Section 5601(a)(1), Title 26 U.S.C.

(b) To unlawfully, wilfully, and knowingly remove, deposit, and conceal a certain commodity for and in respect whereof a tax was imposed by the laws of the United States of America and which tax had not been paid, to wit: certain quantities of distilled spirits, the exact quantities being to the Grand Jurors unknown, with the intention to evade collection by the United States of America, of the tax imposed on such spirits, in violation of Section 7206(4), Title 26, U.S.C.

(c) To unlawfully, wilfully, and knowingly engage in and carry on the business of distillers of spirituous liquors without having given bond as required by law, in violation of Section 5601(a)(4), Title 26 U.S.C.

the "variance" rule are to apprise the defendants of the charges against them so that they may adequately prepare their defense, and to protect the defendants from another prosecution for the same offense. *United States v. Bullock*, ..... F.2d ..... (5th Cir. 1971) [No. 71-1067, November 18, 1971]; *United States v. White*, ..... F.2d ..... (5th Cir. 1971) [No. 71-143, October 19, 1971]. Even if we assume that a variance existed in this case, it could not affect the substantial rights of these defendants. *Monroe v. United States*, 234 F.2d 49 (D.C. Cir. 1956). In addition, no danger that there could be a transference of guilt as expressed in *Kotteakos*, is present here.

The defendants also assert that the evidence was insufficient to prove their guilt. The entire case for the government was built upon the testimony of several named, but not indicted, co-conspirators. This Circuit has held time and again that the testimony of co-conspirators may form a sufficient support to sustain a conviction. *See e.g., United States v. Clifton*, ..... F.2d ..... (5th Cir. 1971) [No. 71-1752, September 10, 1971]. In the case *sub judice*, the declarations of the co-conspirators, if credited by the jury—as they must have been, form a firm enough foundation to uphold the verdict.

After his arrest defendant Walker was instructed by government agents to fill out three personal history forms. They did not inform him that they intended to use his handwriting on these forms to compare with the handwriting on documents previously seized. Walker characterizes this as trickery and asserts that it amounted to a deprivation of his Fifth Amendment right to be free from self-incrimination and his Sixth Amendment right to counsel. It is settled law in this Circuit that compelling an accused to give a handwriting exemplar does not violate the above rights. *See United States v. McGann*, 431 F.2d

1104 (5th Cir. 1970); *Schoenbrun v. United States*, 403 F.2d 57 (5th Cir. 1968). If such samples can be compelled, then we can perceive no prejudice of reversible dimensions in the fact that writings admittedly made by the defendant, but simply not specified as taken for graphological purposes, were later analyzed. Fed.R.Crim.P. 52 (a). *Cf. Graves v. Beto*, 424 F.2d 524 (5th Cir. 1970).

The defendants also assert that if they had complied with the federal liquor laws they would have subjected themselves to prosecution under state law. They cite *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697 (1968) and *Grosso v. United States*, 390 U.S. 85, 88 S.Ct. 722 (1968) to support their self-incrimination argument. This Circuit has repeatedly rejected this contention. *See Henderson v. Blackwell*, 436 F.2d 1081 (5th Cir. 1971) and cases cited therein.

The point of error concerning the prosecutor's remarks is without merit. The judgment of the district court is

AFFIRMED.

**APPENDIX "B"**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 71-2165

Summary Calendar*

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SPENCER O. WALKER and RUBEN IVERY,
Defendants-Appellants.

---

*Appeal from the United States District Court for the Middle District of Georgia*

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(February 29, 1972)

**On Petition for Rehearing**

(Filed February 29, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

**APPENDIX "C"**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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October Term, 1971

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No. 71-2165
Summary Calendar

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D. C. Docket No. CR 1690
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SPENCER O. WALKER and RUBEN IVERY,
Defendants-Appellants.

*Appeal from the United States District Court for the Middle District of Georgia*

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

**Judgment**

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia; and was taken under submission by the Court upon the record and briefs on file; pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 11, 1972

Issued As Mandate:

**APPENDIX "D"**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 71-2165

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SPENCER O. WALKER and
RUBEN IVERY,
*Appellants,*

VS.

UNITED STATES OF AMERICA,
*Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

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**Appellants' Petition for Rehearing**

Comes now Spencer O. Walker and Ruben Ivery, Appellants in the above captioned case and, pursuant to the Federal Rules of Appellate Procedure, move the Court for a rehearing on the following grounds:

1.

That this Court has misapprehended and misapplied the Supreme Court's assessment of what constitutes substantial rights of an accused as outlined in *Kotteakos* v. *United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

This Court in its opinion stated that: ". . . whether a single conspiracy with different unlawful ends or mul-

tiple conspiracies were proved is immaterial in the context of this case since a review of the record convinces us that sufficient evidence was adduced to prove each defendant's connection with all three of the allegations of unlawful conduct." pp. 2 and 3, *United States of America* v. *Spencer O. Walker and Ruben Ivery*, No. 71-2165 (5th Cir. January 11, 1972). This Court then points out that *Kotteakos*, supra, requires that the variance must affect "substantial rights." Appellants agree with this statement from the *Kotteakos* decision. However, this Court overlooked or misapplied the standard the Supreme Court established in *Kotteakos* to determine whether or not substantial rights have been affected.

The Supreme Court in *Kotteakos*, supra, proposed the following tests to determine when substantial rights are affected:

> (1) ". . . the question is, not were they[1] right in their judgment, regardless of the error or its effect upon the verdict. It is rather, what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own,[2] in the total setting." at p. 1566, 90 L.Ed.
>
> (2) "If, when all is said and done, the conviction (sic) is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . but if one cannot say, with fair assurance, after pondering all that happened *without* stripping the *erroneous action from the whole*, that the judgment was not substantially swayed by the error,

1. (they) referring to the jury.
2. referring to reviewing court judge.

*it is impossible to conclude that substantial rights were not affected.*" (Emphasis added)

(3) "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is . . . *whether the error itself* had substantial influence." (Emphasis added) at p. 1567, 90 L.Ed.

(4) Each case must be decided on the *particular set of facts* and circumstances *before the reviewing court,* and the court should "not be governed in any rigid sense of stare decisis by what has been done in similar situations."

The Supreme Court in *Kotteakos,* supra, applied the latter criterion when it declined to follow the previous decision of *Berger* v. *United States,* 295 U.S. 78, 82, 55 S.Ct. 629, 630, even though, as they readily admitted, the facts were on the surface identical. The Court stated that the substantial rights of the accused should be determined by looking at the natural effect of the error "for or against prejudice in the particular setting". The Court stated: "It follows that the *Berger* case is not controlling of this one, notwithstanding that abstractly considered, the errors in variance and instructions were identical in character." *Kotteakos,* supra, at p. 1567, 90 L.Ed.

Applying the principle enunciated in *Kotteakos,* above, the court should not have judged the substantial rights of the appellants by the standards of *Monroe* v. *United States,* 234 F.2d 49 (D.C. Cir. 1956) which it cited as authority for the proposition that appellants' rights were not substantially affected. According to *Kotteakos,* supra, the facts and circumstances should have been weighed by this court with particular attention to the effect of the variance in the particular setting of the case before them.

*Monroe,* supra, applied the tests laid down in *Berger* v. *United States,* supra, which the Supreme Court in *Kotteakos,* a subsequent decision, held that *Berger* should be limited to the particular facts and setting upon which it was decided.

The particular setting and circumstances in the present case show that the appellant was convicted upon oral testimony and physical evidence obtained from other persons alleged to have been co-conspirators of the defendants. The evidence presented at the trial showed that if the defendants were involved in a conspiracy with others, they were separate and distinct and not part of the common scheme or plan which amounted to a general conspiracy as alleged in the indictment. One witness, William Denniston, stated in substance that in 1965 he entered into a conspiracy with the Appellant Walker (R. 137-40). He also stated that this agreement ended in 1966 (App. 142). The notebook which allegedly contained entries relating to the appellant's scheme to defraud the U. S. Government was seized from Denniston, an alleged co-conspirator, as well as certain checks allegedly pertaining to the sale of nontax paid whiskey (App. 152), both of which were presented as bearing the handwriting of Appellant Walker. This evidence certainly influenced the minds of the jurors and this error of presenting evidence of several distinct conspiracies without question prejudiced and detrimentally affected the substantial rights of the appellants.

The Supreme Court in *Kotteakos,* supra, recognized this very real danger of contaminating the minds of the jurors as indicated by the following observation: "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are *so great* that no one can say prejudice to substantial right has not taken place." at p. 1571, 90 L.Ed.

2.

This Court apparently overlooked its decision of *Nalls* v. *United States,* 240 F.2d 707 (5th Cir. 1957) which we cited in our brief, when it held that: "The point of error concerning the prosecutor's remarks is without merit. . ." at p. 4, *U. S.* v. *Spencer Walker and Ruben Ivery,* supra.

In the *Nalls* case, the prosecutor there used almost identical language and this Court held it was prejudicial to the defendant and required a reversal. The objectionable language in the *Nalls* case was presented at the conclusion of the Government's case as in the present case. The parallel between these cases can best be demonstrated by quoting from this Court's opinion:

> "As the Government's proof was concluded, its attorney stated in the presence of the jury: 'We have three other witnesses, one by the name of Ethel Pledger, and also Robert Ligon and Earl A. Stewart who have been subpoenaed by the Government. At this time we tender these witnesses to the Court and the attorney for the defendant. The reason the Government will not put them on, we feel that their testimony might be cumulative, and we do not care to'—." at p. 710.

At this point counsel for the defense objected to these remarks being made before the jury.

As pointed out in our brief this Court stated in *Nalls* supra, that: ". . . such a procedure is inherently unfair to the defendant. . . To proffer the witnesses before the jury under the circumstances here disclosed is to challenge the defendant to use them, or to risk the probability that the jury will hold it against him if he fails to put them on the stand."

In the present case the language used by the Government closely resembles the prohibited statements made in *Nalls,* supra. In the present case the prosecutor stated:

> "Mr. Knight: Your Honor, before resting if we may make a statement we do have some other witnesses that are available if the Defendants would like to call them. We feel that their testimony at this time would be repetitive of what has already been said by the previous witnesses in numerous instances. We'll be happy to furnish them with the names of these people if they so desire to call them.
>
> Mr. Schloth: They're outside.
>
> The Court: In other words, you have other witnesses who are available who can be put on the stand by the Defendants if they want to put them on the stand?
>
> Mr. Knight: That's right.
>
> The Court: Is that what you're saying?
>
> Mr. Knight: That's right.
>
> The Court: Do you want to call their names so that the Defendants' counsel will know who they are.
>
> Mr. Knight: We have a Miss Susie Clay from Fitzgerald and Mr. Gene Hunter; and I believe those are the only two, Your Honor.
>
> The Court: All right, they're available if the Defendants want them.
>
> Mr. Reinhardt: Your Honor, I think that I should respond to the offer of the Government and say, first, that unless I can see the statements of the witnesses that they have given the Government, I can't put them on the stand; and, secondly, the Government witnesses

in this case refused to talk to Mr. Walters and I about this; and, while it might sound very fair for the Government to offer us their witnesses, I can't, of course - - - . . .

Mr. Reinhardt: Well, if the Government would let us read their statements, then we can make a decision.

The Court: Well, I have no control over that either. I can't make anybody talk to anybody and I can't require the Government to give you copies of the statements they have, just like I couldn't require you to give the Government copies of anything you've got. I can't control anything like that. (App. 381-383)" p. 20, *U. S.* v. *Walker,* supra.

After comparing the language used in the present case to that used in *Nalls,* supra, it is clear that this Court overlooked its prior holding.

Even though a Motion for Mistrial was not made at the time prejudicial remarks were made by the Government attorney, the remarks were patently prejudicial on their face, and constituted plain error which affected substantial rights of the appellants. Rule 52(b), Federal Rules of Criminal Procedure requires that such plain error be noticed by the appellate courts.

WHEREFORE, Appellants pray that this their Petition for Rehearing be inquired into and that same be

granted and that the decision of the Trial Court in this case be reversed.

Respectfully submitted,

BYRD, GROOVER & BUFORD

.....

FLOYD M. BUFORD
*Attorney for Appellants*

165 First Street
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.....

JEAN BEENE
*Attorney for Appellants*

Post Office Box 782
Macon, Georgia 31202

CERTIFICATE OF SERVICE

I, FLOYD M. BUFORD, Attorney for the Appellants, do hereby certify that I have this date served a copy of the foregoing Appellants' Petition for Rehearing on Mr. William J. Schloth, United States Attorney, by mailing a copy of same to his post office address at P. O. Box U, Macon, Georgia 31202.

This the ..... day of ....., 1972.

.....

FLOYD M. BUFORD
*Attorney for Appellants*

## APPENDIX "E"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk
March 8, 1972

Mr. Bob Reinhardt
Attorney at Law
209 E. Fourth
Tifton, Ga. 31794

Mr. Floyd M. Buford
Attorney at Law
165 First Street
Macon, Ga. 31202

No. S71-2165—U.S.A. v. Spencer O. Walker and Ruben Ivery

MANDATE STAYED TO: March 30, 1972

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

Edward W. Wadsworth, Clerk
By /s/ Susan Le Brun
Deputy Clerk

enc. (LETTER ONLY)
cc: Mr. Ronald T. Knight